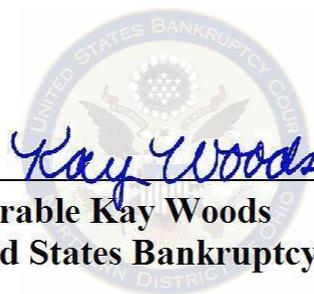


IT IS SO ORDERED.



**Dated: May 31, 2007
04:20:31 PM**

**Honorable Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

**RANDALL J. HAKE and,
MARY ANN HAKE,**

Debtors.

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* **CASE NUMBER 04-41352**
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* **CHAPTER 7**
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* **HONORABLE KAY WOODS**
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MEMORANDUM OPINION
NOT INTENDED FOR NATIONAL PUBLICATION

The following order is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause is before the Court on Debtors' Motion to Enforce Violations of Automatic Stay and for Sanctions ("Motion to Enforce") (Doc. # 624) filed by Randall J. Hake and Mary Ann Hake ("Debtors") on February 21, 2007. The Motion to Enforce seeks an order enforcing the automatic stay against Buckeye Retirement Company L.L.C., Ltd. ("Buckeye") and for sanctions against Buckeye for violating the automatic stay. On March 14, 2007, Buckeye filed Buckeye's Response to Debtors' Motion to Enforce Violation (sic) of Automatic Stay and for Sanctions ("Response") (Doc. # 638). The Court held a hearing ("Hearing") on March 28, 2007.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (G). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. PROCEDURAL BACKGROUND

Debtors originally filed a voluntary petition pursuant to chapter 11 of the Bankruptcy Code on March 25, 2004. The case was converted to chapter 7 on April 26, 2006 ("Conversion Date"). Mark A. Gleason ("Trustee") was confirmed as chapter 7 trustee on August 28, 2006 (Doc. # 523).

Prior to conversion of the case, on or about March 1, 2005, Debtors filed Debtors' Motion to Determine, Clarify, or Extend Automatic Stay ("Motion to Determine") (Doc. # 155). Buckeye filed

Response of Buckeye Retirement Co., L.L.C. Ltd. To Debtors' Motion to Determine, Clarify or Extend Automatic Stay ("Response") (Doc. # 159) on March 8, 2005. Debtors argued in the Motion to Determine that the alleged fraudulent conveyance actions were causes of action constituting property of the bankruptcy estate. Debtors also argued that the potential for recovery of damages in the state court actions were duplicated in the claims filed by Buckeye in Debtors' bankruptcy case.

The Court held a hearing on the Motion to Determine on March 9, 2005. On April 4, 2005, this Court entered Order Granting Debtors' Motion to Determine or Extend Automatic Stay ("Stay Order") (Doc. # 167). The Stay Order stayed all proceedings against all defendants in the Trumbull County Court of Common Pleas ("Trumbull County Court") Case Nos. 02-CV-1273, 03-CV-1208, and 04-CV-141 (collectively, the "State Court Actions"), as well as the debtor's exam ordered in consolidated Case No. 00-CV-17 in the Trumbull County Court.

Buckeye timely appealed the Stay Order to the Sixth Circuit Bankruptcy Appellate Panel ("BAP"). On August 23, 2006, the BAP entered an Order ("BAP Order") (Doc. # 534) remanding the Stay Order to this Court for further order on the basis that: (i) the two-year time period in which the bankruptcy estate could have brought a fraudulent conveyance action had lapsed, and (ii) because the case had been converted to chapter 7, it was no longer appropriate to stay the debtor's exam of Hake Contracting.

Recognizing the contentious relationship between Debtors and Buckeye, this Court anticipated that an order vacating the Stay Order, absent further hearing or discussion, would likely lead to needless, unwarranted litigation and disruption. As a consequence, on September 6, 2006, this Court entered Order Setting Status Conference Pursuant to 11 U.S.C. § 105 ("Status Conference Order") (Doc. # 531), which directed Debtors, Buckeye, Trustee, and the United States Trustee to consider and be prepared to address certain questions and issues outlined in the Status Conference Order at a status conference on September 20, 2006. The questions and issues suggested by the Court included: (i) the relationship of the bankruptcy estate to any assets that might be recovered in the State Court Actions, (ii) Buckeye's basis for pursuing the State Court Actions for its own benefit, (iii) the rights of the other general unsecured creditors to any assets that might be recovered in the State Court Actions, (iv) whether any other general unsecured claimant could pursue the State Court Actions, (v) whether, in the interests of judicial economy, the State Court Actions should be stayed pending resolution of Adversary Proceeding No. 06-4153, in which Buckeye seeks the denial of a discharge to Debtors, and (vi) whether there was any authority from the Sixth Circuit Court of Appeals that could be used as guidance regarding these issues.

All parties attended the scheduled status conference. Instead of engaging in any meaningful dialog, Buckeye objected to the § 105

status conference and argued that it was "unconstitutional" for this Court to hold the status conference. (Transcript of September 20, 2006 status conference (Doc. # 561) at 32, 57.) Although 11 U.S.C. § 105(d) expressly authorizes this Court to conduct status conferences as necessary, Buckeye refused to participate in any meaningful way. As a result of Buckeye's position, the status conference was concluded without resolution of any of the issues posed by the Court.

On September 25, 2006, this Court entered Order Vacating Order Granting Debtors' Motion to Determine or Extend Automatic Stay ("September 25 Order") (Doc. # 549). The September 25 Order specifically noted that: (i) Trustee had not abandoned any property of the bankruptcy estate, and (ii) the automatic stay pursuant to 11 U.S.C. § 362 had not been lifted or modified.

The Order to Enforce is directly related to actions taken by Buckeye in connection with the State Court Actions, which actions Debtors contend violate the automatic stay in 11 U.S.C. § 362.

As set forth above, Debtors filed the Motion to Enforce and Buckeye filed its Response. At the conclusion of the Hearing, the Court took this matter under advisement. Buckeye expressly stated at the Hearing that it would take no further action in the State Court Actions pending resolution of the Motion to Enforce by this Court.

II. THE LAW

Debtors seek to "enforce" the automatic stay and obtain sanctions against Buckeye for violation of the automatic stay. The stay in 11 U.S.C. § 362 goes into effect automatically upon the filing of a voluntary bankruptcy petition and is applicable even if other parties are not aware of the bankruptcy filing. Section 362 provides as follows:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301 . . . of this title . . . operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial . . . action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

11 U.S.C. § 362(a) (West 2004).

The automatic stay remains in place until either (i) the conclusion of the case or (ii) a party obtains an order from the bankruptcy court modifying or lifting the stay. See 11 U.S.C. § 362(c); *In re Parker*, 154 B.R. 240, at 241-42 (Bankr. S.D. Ohio, 1993) ("The stay is not permanent, however, and may expire by operation of the law, or be terminated or modified by the bankruptcy court upon a request for relief from the automatic stay by a party in interest accompanied by a showing of statutory entitlement to such relief."). The Bankruptcy Code specifically provides a process for a party to obtain relief from stay.

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

11 U.S.C. § 362(d) (West 2004).

In the instant case, the automatic stay has never been lifted or modified regarding Debtors or property of the bankruptcy estate. Conversion of a case from one chapter to another has no effect on the continuation of the automatic stay. Case law that addresses post-conversion applicability of the automatic stay is quite different from the circumstances in the instant case. In most cases found by the Court, the issue was whether relief from stay obtained pre-conversion continued after a case was converted, or whether a new automatic stay went into effect at the time of conversion. See *In re Parker*, 154 B.R. at 243 ("[T]his court finds that the conversion of the debtor's chapter 7 case to chapter 13 did not cause the stay to be reimposed and that the conversion did not affect this court's earlier order granting relief from stay"). That type of situation does not exist here because the automatic stay was never modified or annulled prior to conversion of this case. Buckeye failed to obtain relief from stay. As a consequence, the automatic stay was in effect prior to the Conversion Date and it continues to be in effect today.

Despite Buckeye's repeated invocation of the BAP Order, that order did not affect the automatic stay applicable to Debtors or property of

the bankruptcy estate in this case. The BAP Order did nothing more than acknowledge that certain causes of action could no longer be pursued by Trustee because the statute of limitations had expired. The BAP Order did not and could not expand Buckeye's rights with respect to causes of action encompassed within the automatic stay.

**III. ALLEGED LIMITATION TO POST-CONVERSION ACTS
AS VIOLATION OF AUTOMATIC STAY**

On or about November 7, 2006, Buckeye filed a motion for leave to file a second amended complaint to add new causes of action against Debtors in one of the State Court Actions, Case No. 03-CV-1208. Buckeye asserts that it "made it clear in the Second Amended Complaint that it was only seeking a recovery against the Debtors for post-conversion wrongful conduct, and was not making a claim against the Debtors for any pre-conversion wrongful conduct." (Response at 2.) Buckeye argues that, since it has limited its allegations against Debtors to conduct that occurred after the Conversion Date, there is no violation of the automatic stay.

Because Debtors refrained from objecting to the motion for leave to amend the State Court Action complaint, Buckeye postulates that "Debtors do not contend that the prosecution of the Ohio RICO suit against the Debtors, in and of itself, is a violation of the §362 (sic) bankruptcy stay." (*Id.*) Buckeye places a great deal of emphasis on Debtors' failure to respond or object to the motion for leave to amend. ("At no time did the Debtors object to Buckeye's Motion for Leave on any grounds." (*Id.* at 4 (emphasis in original).))

Buckeye's reliance is misplaced, however, because Buckeye ignores Debtors' actions in moving to dismiss the amended complaint. In any event, whether or not Debtors believe that Buckeye's actions violate the stay is not determinative of whether such actions actually did violate the stay. In the instant case, because the State Court Actions were stayed as to Debtors, Debtors' choice to refrain from objecting to the motion for leave to amend has no significance. To hold otherwise would be tantamount to standing the automatic stay on its head. Debtors are not required to respond to motions or otherwise defend themselves in a stayed case. If a debtor were required to respond to every motion in a stayed case, the automatic stay would provide little protection and would, in essence, be meaningless.

By moving to amend the complaint to add new allegations and causes of action against Debtors, Buckeye was attempting to "continue" a judicial action against Debtors that had been commenced prior to the commencement of the bankruptcy case. At the time Buckeye moved for leave to amend, the State Court Action was stayed as to Debtors. Buckeye's conduct falls squarely within the prohibition in § 362(a).

Buckeye contends that, by asserting only post-Conversion Date allegations against Debtors, its actions do not come within the purview of § 362; however, Buckeye is incorrect in that position. There is no question that - because Buckeye never sought nor obtained relief from the automatic stay - the State Court Actions were (and continue to be) stayed as to Debtors and property of the bankruptcy estate. Before seeking leave to amend a complaint in one of the State Court Actions,

Buckeye was required to obtain relief from the automatic stay from this Court. At the time Buckeye sought leave of the Trumbull County Court to assert additional allegations against Debtors, Buckeye was stayed from taking or continuing any action against Debtors in the State Court Actions. Thus, even if, *arguendo*, Buckeye has limited the allegations against Debtors in the Second Amended Complaint to post-Conversion Date conduct, Buckeye's conduct in moving for leave to amend the complaint violated the automatic stay.

Buckeye's belief that its actions were outside the automatic stay, because they dealt with alleged "post-conversion" actions only, did not relieve it of the obligation to seek relief from stay. As Bankruptcy Judge Thomas Waldron stated in *Hill v. Fidelity Financial Services Progressive Ins. Co., (In re Hill)*, 174 B.R. 949 (S.D. Ohio 1994), "If a creditor believes that it is entitled to property disputed to be property of a debtor's estate, the Code requires a judicial determination of the relative rights of the parties with respect to the funds and an immediate order from the bankruptcy court modifying or conditioning the stay until the issue can be determined." (*Id.* at 954.) In the *Hill* case, because Fidelity failed to take advantage of the opportunity to obtain relief from stay, the bankruptcy court found that Fidelity had committed a willful violation of the stay.

In *In re Fiber Optek Interconnect*, 2006 Bankr. LEXIS 2961 (Bankr. S.D.N.Y. 2006), the Bankruptcy Court considered a motion for relief from stay so that plaintiff could file an amended complaint in a state court action against debtor and other non-debtor entities. Plaintiff sought

leave to amend in order to assert a cause of action (which had originally been asserted only against the debtor) against non-debtor parties. The trial court entered an order stating, "Without a lift of the bankruptcy stay this court cannot permit an amendment of the pleadings or any other action." (*Id.* at *6.) Bankruptcy Judge Cecelia Morris held, "Although this Court finds that no estate interest will be implicated in the state court litigation, Justice Brands and [plaintiff] were wise to proceed with caution in a case that included a debtor in bankruptcy as a named party." (*Id.* at *8-9.) Ultimately, the Bankruptcy Court granted the motion for relief from stay, finding that there was "no possibility of litigation in two forums" if the stay were lifted. (*Id.* at *14.)

The rationale of needing to obtain relief from the automatic stay is even more persuasive in the instant case. In *Fiber Optek*, the plaintiff sought to assert a cause of action against non-debtor parties only; whereas, in the instant case, Buckeye's leave to amend was for the primary purpose of asserting new causes of action against Debtors

IV. WILLFULNESS OF VIOLATION

Buckeye's conduct not only violated the automatic stay, it constitutes a willful violation of the stay. Buckeye was well aware of Debtors' bankruptcy case and has been an extremely active participant therein. Buckeye filed an adversary proceeding seeking to deny Debtors a discharge, which reflects many of the same allegations that are contained in the amended complaint in Trumbull County Court. The only purported difference is the time frame for the alleged violations.

Moreover, Buckeye's aggressive opposition to this Court's § 105 status conference demonstrates that Buckeye did not want to reach any understanding about the State Court Actions; Buckeye intended to proceed unilaterally in Trumbull County Court. Buckeye's attempt to amend the State Court Action appears to be a clear effort to seek a determination of similar, if not identical, issues in two forums - this Court and the Trumbull County Court.

In *Smith v. GTE North Inc. (In re Smith)*, 170 B.R. 111, (Bankr. N.D. Ohio 1994), the Bankruptcy Court found that GTE's conduct in twice disconnecting debtors' telephone service for nonpayment of a debt incurred prior to conversion of the case from chapter 13 to chapter 7 constituted a willful violation of the stay. GTE had also received, through collection efforts, money that represented payment on a pre-conversion debt. Judge Walter Krasniewski held that a "'willful violation' does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the automatic stay were intentional." *Id.* at 115 (quoting *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 227 (9th Cir. 1989)(citations omitted)), *See also, In re Bennett*, 135 Bankr. 72, 75 (Bankr. S.D. Ohio 1992) (debtor need not prove "bad faith or maliciousness").

In addition, the automatic stay "applies to all debts, even those 'that will' ultimately be excepted from discharge." *Brooks v. Brooks (In re Brooks)*, 2007 Bankr. LEXIS 552 at *8 (Bankr. E.D. Tenn. 2007).

If Buckeye wanted to amend a complaint in one of the State Court Actions to assert a new cause of action against Debtors, Buckeye was required to first obtain relief from stay in this Court. Buckeye failed to do so. As a consequence, this Court finds that Buckeye's conduct in (i) moving for leave to amend, and (ii) amending the complaint in the State Court Action constitutes an intentional and willful violation of the automatic stay set forth in § 362 of the Bankruptcy Code.

In the instant case, Buckeye's actions were clearly intentional. In view of the totality of the circumstances, this Court can only find that Buckeye's conduct constitutes willful disregard of the automatic stay.

V. REMEDY FOR WILLFUL VIOLATION OF STAY

Section 362(h) of the Bankruptcy Code¹ (now § 362(k)(1)) specifically provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h) (West 2004). Actual damages include, at minimum, attorney's fees and other costs incurred as a result of the willful violation. In *In re Smith*, the court awarded debtors their "actual damages," which consisted of attorney's fees in the amount of \$1,235.00, turnover of \$109.28 received

¹ On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") went into effect. BAPCPA made significant changes to § 362, which resulted in re-lettering of certain subsections. Because the instant case was filed prior to the effective date of BAPCPA, the pre-BAPCPA version of the Code controls.

in payment of a pre-conversion debt, and punitive damages in the amount of \$1,000.00. *In re Smith*, 170 B.R. at 117-18.

As a consequence, this Court grants Debtors their (i) costs and expenses in enforcing the automatic stay, including attorney's fees in this action, and (ii) costs and expenses, including attorney's fees, in connection with the State Court Actions resulting from or relating to Buckeye's violation of the automatic stay. Debtors are directed to submit an itemized statement of such costs and expenses by June 14, 2007. The Court will review the itemized statement and will award an appropriate sanction.

VI. EFFECT OF COURT'S RULING REGARDING VIOLATION OF STAY

At the Hearing, Buckeye stated that the State Court Action would be stayed pending this Court's resolution of the Motion to Enforce. Because Buckeye has not obtained relief from the automatic stay, the Second Amended Complaint is void against Debtors. The Sixth Circuit has held that actions taken in violation of the automatic stay are void.

A majority of the circuits, including this Circuit, have held that actions taken in violation of the automatic stay are void. 2 L. King, *Collier on Bankruptcy* § 362.11 (15th ed. 1987) ("actions taken in violation of the stay are void and without effect"). The Fifth Circuit is alone in explicitly holding that actions taken during the pendency of the stay are voidable.

Easley v. Pettibone Michigan Corp., Indus. & Constr. Machine, 990 F.2d 905, 909 (6th Cir. 1993) (internal citations omitted.).

As a consequence, Buckeye's "voluntary stay" of the State Court Action is redundant, because not only does the automatic stay apply,

Buckeye's actions in seeking leave to amend and then amending the complaint in the State Court Action are void against Debtors.

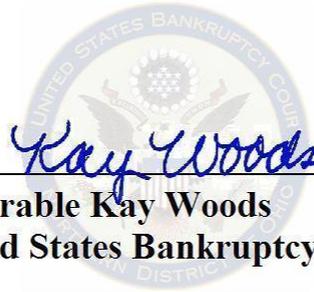
VII. CONCLUSION

As set forth above, Buckeye's conduct in seeking leave to amend and then amending a complaint in one of the State Court Actions violated the automatic stay. Such action constituted an intentional and willful violation of the stay. Buckeye's actions in seeking to amend and then amending the complaint in the State Court Action are void as to Debtors.

An appropriate Order will follow.

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IT IS SO ORDERED.



**Dated: May 31, 2007
04:20:31 PM**

**Honorable Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

**RANDALL J. HAKE and,
MARY ANN HAKE,**

Debtors.

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**CASE NUMBER 04-41352
CHAPTER 7
HONORABLE KAY WOODS**

O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered on this date, Buckeye Retirement L.L.C., Ltd. ("Buckeye") is found to be in willful violation of the automatic stay, set forth in § 362 of the Bankruptcy Code, for taking the following actions in the State Court Action: (i) moving for leave to amend, and (ii) amending the complaint. As a consequence, this Court awards Randall J. Hake and Mary Ann Hake ("Debtors") their (i) costs and expenses in enforcing the automatic stay, including attorney's fees in this action, and (ii) costs and expenses,

including attorney's fees, in connection with the State Court Actions resulting from or relating to Buckeye's violation of the automatic stay. Debtors are directed to submit an itemized statement of such costs and expenses by June 14, 2007. After review of such statement, the Court will award an appropriate sanction.

IT IS SO ORDERED.

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